Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BRK:TL-N-214-00
HNAdams

date: October 25, 2000

to: Large & Mid Size Business Division
Territory Manager (Heavy Manufacturing, Construction & Transportation)
Attn: [redacted], Group [redacted]

from: Associate Area Counsel (Financial Services & Healthcare)
CC:LM:FSH:BRK

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subject: [redacted] - [redacted]

U.I.L. No. 7602.00-00

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Reference is made to your request of September 19, 2000 for assistance with respect to summonses that you intend to issue to the above-referenced taxpayer. You asked us to review the language of the proposed summonses and to advise: (1) who they should be served upon, (2) whether the persons to whom they are to be served upon are third parties for purposes of the pre-notification requirements of Code section 7602(c), and (3) whether the persons to whom they are to be served upon are third party recordkeepers within the meaning of Code section 7603(b) (which permits service of summonses on third party recordkeepers to be made by certified or registered mail).

BACKGROUND

For purposes of this response, we understand the facts are as follows.[1] [redacted] ("[redacted]"), a subsidiary of [redacted] and a member of its consolidated group, owned [redacted] that were leased to [redacted]. The [redacted] were held by the [redacted] business unit of [redacted], which had fully depreciated them. Although the [redacted] were fully depreciated, they remained leased to [redacted] and were expected to continue to generate significant taxable income. As a result, [redacted] had booked for financial accounting purposes a liability for deferred tax which would become due over the remaining years of the leases.

On [redacted], [redacted], Managing Director of the New York City office of [redacted] (a company involved in the leasing industry), sent [redacted], Senior Vice President of [redacted], a letter agreement relating to "a proprietary and highly confidential" investment structure that he proposed to disclose to her under conditions of confidentiality. The letter referred to the structure as a "[redacted]." [redacted] executed the letter agreement on [redacted] agreeing to keep the structure confidential.

The plan proposed by [redacted] involved the contribution by [redacted] of fully-depreciated leased [redacted] to a partnership through which [redacted] percent of the taxable income that [redacted] would have reported from the [redacted] would be allocated to another party.

In furtherance of that plan, [redacted] contributed fully-depreciated leased [redacted] to [redacted]. [redacted] is a Delaware corporation that is [redacted] percent owned by [redacted] and that is a member of the [redacted] consolidated group. Its principal place of business is [redacted]. On [redacted], [redacted], [redacted] (another Delaware corporation operated out of [redacted] that is owned by [redacted] and that is a member of the [redacted] consolidated group), and [redacted] (a [redacted] corporation, the principal place of business of which was [redacted] and that was owned by [redacted]) became the original members of [redacted]. That LLC was formed under Nevada law and was to have a principal place of business in [redacted] (the LLC's [redacted] through [redacted] U.S.

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[1] Our understanding of the facts is based primarily on the factual discussion contained in your May 19, 2000 request for Field Service Advice.

partnership returns reflected its address as [redacted]). [redacted] was credited with initial contributions to [redacted] of $[redacted] which consisted of the $[redacted] agreed value of the leased [redacted], accrued rents due under the leases of $[redacted], and $[redacted] of cash, less non-recourse debt of $[redacted]. [redacted] and [redacted] contributed cash in the amounts of $[redacted] and $[redacted], respectively.

Also on [redacted], [redacted] contributed $[redacted] of cash ($[redacted] less than the $[redacted] of cash it received that day from [redacted], [redacted], and [redacted] to its [redacted] percent owned subsidiary [redacted]. That subsidiary is a Delaware corporation with a principal place of business in [redacted].

On [redacted], [redacted] and [redacted] entered into an agreement under which [redacted] engaged [redacted] to locate one or more "equity investors" to purchase an interest in [redacted].

On [redacted], the articles of incorporation of [redacted] were amended. Its name was changed to [redacted], two new members were added, and [redacted] withdrew as a member. The two new members, sometimes referred to as "equity investors", were [redacted] and [redacted] (both banks organized under the laws of the [redacted]). They each paid $[redacted] for one half of [redacted]'s interest, and then each contributed $[redacted] to the LLC. [redacted] paid each of the equity investors a fee of $[redacted] to induce them to join the LLC. [redacted] purchased the interest of [redacted] for $[redacted] and then contributed an additional $[redacted] to the LLC.

Also on [redacted], [redacted] - [redacted] contributed $[redacted] of cash to its [redacted] percent owned subsidiary [redacted].

Under the terms of [redacted]'s operating agreement, its members had no "right or power to take part in the management or control of the Company or its business and affairs or to act for or bind the Company in any way." [redacted] Instead, its management was vested in a group of three managers. See [redacted] The operating agreement required each of the three managers to be United States citizens, but provided that none of the managers were

to be United States residents. See [redacted]. One of the three managers was required to be a resident of the LLC's principal place of business ([redacted], see [redacted] and [redacted] and the other two managers were required to be residents of countries other than the United States or the United Kingdom ([redacted]). The three managers were identified in the Amended and Restated Operating Agreement as [redacted] of [redacted], [redacted] of [redacted], and [redacted] of [redacted]. The agreement provided that the managers were elected by [redacted]'s Class B Members, which were [redacted] and [redacted]. The agreement provided that the Class A Members (the [redacted] banks) generally had no voting power or voting rights (see [redacted]).

Under the agreement, [redacted] percent of profits for each year was to be allocated to the equity investors, and [redacted] percent of profits each year was to be allocated to [redacted] and [redacted]. The [redacted] banks had the right to cause [redacted] to be liquidated if it failed to distribute to them immediately available funds in the following amounts on the last business day of the fiscal year:

Date	Amount
[redacted]	$ [redacted]

See [redacted] and Exhibit E.

The [redacted]'s operating agreement provided that capital accounts would be maintained for each member. The capital accounts were to be increased for property contributed by each member and the book income allocated to the member, and decreased for distributions to each member and book losses allocated to each member. On liquidation, the equity investors were to receive cash payments equal to the values of their capital accounts plus "equity investor guaranteed payments."

The arrangements with respect to the allocation of income and losses, annual distributions, and the allocation of gains or losses on liquidation were designed to ensure that the equity investors would receive annual returns of at least [redacted] percent on their contributions. The equity investors were not absolutely guaranteed

annual returns of [redacted] percent, however, even with the guaranteed payments.

Other than the leased assets and assets to replace them in the event of a default or similar event, [redacted] was permitted to own only: (1) stock in its subsidiary [redacted], (2) cash and cash equivalents, and (3) securities with remaining maturities of no longer than 90 days, floating rate demand obligations, or floating rate commercial paper. [redacted] was permitted to own only: (1) high grade commercial paper, equity securities, and publicly traded bonds and debentures; (2) cash and cash equivalents; and (3) assets leased to [redacted] under triple net leases. The $[redacted] that [redacted] Company invested in [redacted] ($[redacted] on [redacted] and $[redacted] on [redacted]) was in fact invested by [redacted] in [redacted] commercial paper. That commercial paper yielded less than the [redacted] percent or greater annual return the banks were to receive under the [redacted] operating agreement.

[redacted] filed U.S. Partnership returns for [redacted] through [redacted] in which it designated [redacted] as its tax matters partner.

[redacted] and [redacted] sold their interests in [redacted] to [redacted] and [redacted], respectively, on [redacted]. Those corporations are subsidiaries of [redacted].

Because the transaction allocates the income from the leased [redacted] to a party (the [redacted] banks) other than the party that claimed the depreciation relating to them ([redacted]'s [redacted] business unit), the transaction is a lease stripping transaction that falls squarely within IRS Notice 95-53. See FSA 200002019 (Oct. 12, 1999).

In connection with your examination of the returns of [redacted], you propose to summons information from [redacted], [redacted], and the [redacted] banks.

ISSUES

1. Are [redacted], [redacted], and the [redacted] banks third parties for purposes of the pre-notification requirements of Code section 7602(c)?

2. Are [redacted], [redacted], and the [redacted] banks third party recordkeepers within the meaning of Code section 7603(b)?

3. Who should the summonses be served upon?

4. By when should the summonses be served?

5. What recommendations do we have regarding the summons language?

CONCLUSIONS

1. We recommend that you treat all parties other than [redacted]'s managers and its Tax Matters Partner [redacted] as third parties for purposes of the pre-notification requirements of Code section 7602(c). We specifically recommend that you treat the four entities from which you propose to summons information ([redacted], [redacted], and the [redacted] banks) as third parties. We recommend further that you send the notices of third party contacts required by Code section 7602(c) to [redacted] Tax Matters Partner [redacted].

2. We do not believe that any of the four entities you propose to summons fit clearly within the categories identified in Code section 7603(b)(2) as third-party recordkeepers. As a result, we recommend that you do not rely on Code section 7603(b) for purposes of serving summonses on them.

3. We recommend that any summonses to the entities involved, which are all corporations, be served on officers of the entities.

4. We recommend that any summonses relating to [redacted] be issued before the issuance of the FPAA for the years to which the summonses relate.

5. Recommendations regarding the language of the summonses are set forth below.

ANALYSIS

1. Are the Parties You Propose to Summons Third Parties for Purposes of the Pre-Notification Requirements of Code Section 7602(c)?

Code section 7602(c)(1) provides that IRS employees:

> may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

Code section 7602(c)(3) identifies three circumstances in which that rule does not apply, none of which appears to be present in this case. The question you raise is whether the pre-notification requirements apply to contacts with [redacted], [redacted], and the [redacted] banks.

We believe that an argument can be made that contacts with [redacted] are not third party contacts and are requesting Field Service Advice on that issue. Pending the receipt of a favorable response to that request, we recommend that you adopt a conservative approach and treat contacts with all parties other than [redacted]'s managers and its Tax Matters Partner as third parties for purposes of the pre-notification requirements of Code section 7602(c). Our rationale for that advice is set forth below.

The Service takes the position that contacts with officers and employees of business taxpayers are not third party contacts for purposes of Code section 7602(c) as long as the officers or employees are acting within the scope of their employment. See Handbook 5.1 Chapter 17.2 paragraph 3.M. (stating that when taxpayer under investigation is a business, contacts made with employees acting within the scope of their employment are not third party contacts); Section 7602(c) Working Group Questions and Answers 2.6.1 (concluding that contacts with officers and employees of corporate taxpayers on business premises during business hours are not third party contacts unless it is clear that they are not acting within the scope of their employment). In addition, contacts with individuals who have valid powers of attorney for a taxpayer are not considered third party contacts. See Handbook 5.1 Chapter 17.2 paragraph 3.G. The rationale that links those rules is that contacts with business entities, such as the taxpayer here, through the individuals who represent them are not third party contacts. The application of that rationale to entities such as partnerships and Limited Liability Companies supports the view that contacts with the persons who are authorized to represent those entities are not third party contacts.

The Amended and Restated Operating Agreement of [redacted] provides that its members have no

"right or power to take part in the management or control of the Company or its business and affairs or to act for or bind the Company in any way." [redacted]. Instead, its management is vested in a group of three managers. See [redacted] As a result, we believe that contacts with the three managers of the LLC would not be considered third party contacts for purposes of Code section 7602(c) because they would be acting within the scope of their employment and authority. However, as members of the LLC have no right or power to take part in the management or control of the LLC or its business and affairs or to act for or bind the LLC in any way, we believe that contacts with them should be considered third party contacts. The exception is contacts with [redacted]. We believe that contacts with [redacted] should not be considered third party contacts because it was designated the LLC's Tax Matters Partner and is thus authorized by the LLC to act as its statutory representative for purposes of TEFRA proceedings.

With respect to [redacted], the parent of [redacted], the argument that contacts with it should not be considered third party contacts is based on the TEFRA partnership provision and the consolidated return regulations. For purposes of the TEFRA partnership provisions, the corporate parent of a subsidiary partner is treated as a partner under Code section 6231(a)(2)(B) if the parent and subsidiary file a consolidated return. As a result, [redacted] should arguably be treated the same as [redacted] for purposes of Code section 7602(c). Additional support for this approach can be found in Treas. Reg. section 1.1502-77(a). That regulation makes the common parent of a consolidated group the sole agent for each subsidiary in the group. That regulation arguably makes [redacted], the parent of the consolidated group that includes [redacted] and [redacted], the sole agent of [redacted] for tax purposes. The weakness of that approach is that it ignores that [redacted] lacks actual authority to bind the [redacted]. Neither the LLC's designation of [redacted] as its TMP nor the operating agreement appear to transfer the authority to bind the LLC from [redacted] to its parent. As was discussed above, because this issue is not free from doubt, we recommend that you treat [redacted] as a third party for purposes of Code section 7602(c), unless you are notified that we have received a favorable response to our request for Field Service Advice on this issue.

An issue that you did not raise is to whom the notices of third party contacts required by Code section 7602(c) should be sent. We believe the notices should be sent to [redacted] because it was designated the LLC's Tax Matters Partner. As indicated above, under Treas. Reg. section 1.1502-77(a), the parent

of the consolidated group is the sole agent for each member of the group. This means that the subsidiary may not act on its own behalf with respect to tax matters; only the parent may act for the subsidiary. In addition, notices are to be sent to the parent, not to the subsidiary, and the notice to the parent will be treated as notice to the subsidiary. Notwithstanding the above, the common parent of the consolidated group that includes [redacted] is not eligible to be the TMP of [redacted]. The Tax Matters Partner of the LLC must be a member or the LLC, and the common parent of [redacted]'s consolidated group was not a member. See I.R.C. § 6231(a)(7)(defining Tax Matters Partner as either the general partner designated as provided by the regulations, or if none the general partner having the largest profits interest, or finally the partner selected by the Secretary); Treas. Reg. § 301.6231(a)(7)-1 (providing rules for designating or selecting a Tax Matters Partner from among partners). We accordingly believe that [redacted] is the entity that is entitled to receive the notices of third party contacts with respect to [redacted].[2/]

2. Are the Entities You Propose to Summons Third Party Recordkeepers Within the Meaning of Code Section 7603(b)?

Code section 7603(b)(1) provides that the Service may serve summonses "for the production of books, papers, records, or other data" on third party recordkeepers "by certified or registered mail to the last known address of such recordkeeper." Code section 7603(b)(2) defines third-party recordkeeper for purposes of Code section 7603(b)(1) as:

> (A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

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[2] Nonetheless, whenever the statute or the Tax Court Rules require the TMP's signature (for example, on extensions of the statute of limitations, settlement agreements, and decision documents) we recommend that the signatures of both the [redacted] and the common parent of its consolidated group be obtained if at all possible.

(B) any consumer reporting agency (as defined under section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3));

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof,

(I) any enrolled agent, and

(J) any owner or developer of a computer software source code (as defined in section 7612(d)(2)).[3/]

We do not believe that any of the four parties that you propose to summons fit clearly within one of the above categories. As a result, we recommend that you do not rely on Code section 7603(b) applying for purposes of serving summonses on any of the four parties.[4/]

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[3] Code section 7603(b)(2) provides that subparagraph 7603(b)(2)(J) shall apply only with respect to a summons requiring the production of the source code referred to in subparagraph (J) or the program and data described in section 7612(b)(1)(A)(ii) to which such source code relates.

[4] In addition, we note that section 7603(b) refers only to summonses the third-party recordkeepers "for the production of books, papers, records, or other data * * *." It does not appear to apply to summonses that seek the appearance of an individual to appear and give testimony. We therefore recommend that you do not rely on section 7603(b) when serving summonses that seek to compel an individual to appear and give testimony.

[redacted] - The most likely category that would potentially apply to [redacted] is category (D). That category includes "any broker" as defined in section 3(a)(4) of the Securities Exchange Act of 1934. That section defines broker as "any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank." Section 3(a)(10) of the Securities Act of 1934 defines securities to include instruments such as stocks, bonds, debentures, certificates of interest or participation in profit-sharing agreements, etc. Although [redacted] appears to have been the promoter of the transaction at issue, it is unclear that it is "engaged in the business of effecting transactions in securities for the account of others" as required to meet the definition of broker for purposes of section 7603(b).

[redacted] - [redacted] does not appear to clearly fit within any of the above categories.

[redacted] and [redacted] - The most likely category that would potentially apply to the two [redacted] banks is category (A). That category includes "any bank" as defined in Code section 581. Code section 581 defines "bank" as "a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or of any State * * *." (Emphasis added). It appears that neither of the two [redacted] banks meets that definition as we understand that they were organized under the laws of the [redacted] rather than incorporated under the laws of the United States or any State. If the banks engage in the business of effecting transactions in securities for the account of others, they would arguably qualify as "brokers" under category (D). However, we do not recommend that you take that position as the facts do not clearly reflects that the [redacted] banks engage in the business of effecting transactions in securities for the account of others.

3. Upon Who Should the Summonses Be Served?

Handbook 109.1 (The Summons Handbook) provides guidance relating to the service of summonses. Section 3.2 of Handbook 109.1 specifies that after a summons has been prepared, it must be served in accordance with Code section 7603. It provides that where a summons is directed to a corporation, service must be made upon a corporate officer or other person authorized to accept service of the summons on behalf of the corporation. It also provides that a summons may be issued to a corporation for the production of corporate records.

In determining whether a summons has been properly served on a corporation, authorities under Federal Rule of Civil Procedure 4(d)(3) are relevant. See United States v. Toyota Motor Corp., 569 F. Supp. 1158, 1160 (C.D. Cal. 1983). That rule provides that corporations and partnerships may be served through "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *." Under that rule, Courts have upheld as valid service made upon corporations through officers such as the following: president (Latini v. R.M. Dubin Corp., 90 F. Supp. 212 (D. Ill. 1950); Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1404 (9th Cir. 1994), cert. denied, 514 U.S. 1004 (1995)), vice president (Bonesteel v. Steelco Stainless Steel, 97 F. Supp. 985 (D. Ohio 1951)), and assistant treasurer (United States v. Central Theatre Corp., 187 F. Supp. 114 (D. Neb. 1960)).

Based on the foregoing, we recommend that any summonses to the four entities that you propose to summons, which are all corporations, be served on officers of those corporations. If the summonses seek the testimony of specific individuals from those entities who you have identified as having personal knowledge of the transactions engaged in to implement the [redacted] structure, we recommend that they be directed to and served on those individuals. Consistent with our recommendation that contacts with any parties other than the three managers of [redacted] and its TMP [redacted] be treated as third party contacts, we recommend that contact with specific individuals from those entities be treated as third party contacts.[5/]

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[5] Section 2.3 of Handbook 109.1 provides guidance with respect to describing the summoned party. It recommends that when a corporate officer is summoned to give testimony or produce records in an official capacity, the description of the summoned party should include the officer's title. For example, John Smith, the president of the X Corporation, should be summoned as "John Smith, as President of X Corporation" rather than as "John Smith, President," or "John Smith." If a summons seeks corporate records and the Service does not need the testimony of a custodian of the records, section 2.3 of Handbook 109.1 recommends that the complete business name of the corporation be listed as the summoned party, e.g., The XYZ Corporation or SYZ Industries, Inc. If the Service needs the testimony of the custodian of records and the name of that person is unknown, it recommends that the summoned party be identified as simply the custodian of records, e.g., Custodian of Records, XYZ Corporation.

4. By When Should the Summonses Be Served?

We recommend that you serve any summonses that you intend to serve before the mailing of the FPAA for the years to which the summonses relate. Section 4.4.8 of Handbook 109.1 provides that after the Service has issued a Statutory Notice of Deficiency to a taxpayer, it must not issue a summons to continue its investigation of the taxable periods included in the deficiency notice. It explains that doing so can generate situations that conflict with and undermine the United States Tax Court's role in administering its procedural rules of discovery. See Mary K. Ash v. Commissioner, 96 T.C. 459, 470-71 (1991) (stating that Tax Court will use its inherent power to prevent the Service from obtaining evidence from a taxpayer by way of a summons issued after litigation has commenced for the taxable year to which the summons relates). In contrast, section 4.4.8 recognizes that the Service may enforce a summons issued before the deficiency notice was mailed even if the enforcement action is commenced after the deficiency notice is mailed.

5. Suggestions Relating to Summons Language

Finally, you asked for our comments on the language proposed for summonses to [redacted], [redacted], and the [redacted] banks.

a. Suggestions Relating to Summons to [redacted]

The language for this summons was drafted by Upstate New York District Counsel. At our meeting on [redacted], we discussed typographical changes to be made to the summons. In addition, we recommend the following:

(1) We recommend that the summons be issued to and served upon an officer of [redacted] who you have identified as having personal knowledge of the negotiation and execution of the transactions engaged in to implement the "[redacted]" structure using the following as the description of the summoned party: Mr. (or Ms.) [redacted], as [redacted] (title) of [redacted]. If that is not possible, then we recommend that the summons be directed to:

> [redacted], by and through any individual or individuals designated by [redacted] who possess personal or institutional knowledge of the negotiation and execution of the transactions engaged in to implement the "[redacted]

[redacted]" structure that involved [redacted], [redacted], [redacted], [redacted], [redacted] (renamed [redacted]), [redacted], and [redacted].

(2) We recommend that you change the definition of [redacted] in Attachment 1 to the summons to read as follows:

> 2. The term "[redacted]" refers to [redacted] and its affiliated corporations [redacted], [redacted], and [redacted].

(3) We recommend that the following definition be added to Attachment 1 to the summons:

> 7. The term "[redacted] transaction" refers to the series of transactions engaged in to implement the "[redacted]" structure that was the subject of [redacted]'s. [redacted] letter to [redacted] Senior Vice President [redacted] and that involved [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] (later renamed [redacted]), [redacted], and [redacted].

(4) We recommend that all references to "the [redacted] transaction" and "the [redacted] transactions" in Attachment 2 to the summons be changed to "the [redacted] transaction."

b. Suggestions Relating to Summons to [redacted]

The language for this summons was drafted by Revenue Agent [redacted] of the [redacted] examination team. We performed a LEXIS search of California Secretary of State corporate records to ascertain the status of [redacted]. We learned that it incorporated in California in [redacted] but had merged into [redacted] on [redacted]. According to California Secretary of State limited partnership records, [redacted] is an active foreign limited partnership that was formed

in Delaware on [redacted]. Its main address is listed as [redacted]. Its registered agent is listed as [redacted]. Its general partner is listed as [redacted], which has the same address and registered agent as [redacted]. California Secretary of State LLC records reflect that [redacted] has the same address and registered agent as [redacted]. The general partners of [redacted] are listed as [redacted] and [redacted], both with the same address as both [redacted] and [redacted].

California law authorized [redacted] to merge into [redacted]. It provides that the merger became effective in accordance with the law of the jurisdiction in which the surviving party is organized. Cal. Corp. Code § 1113(j)(4). It provides that upon merger, [redacted]'s separate existence ceased and [redacted] succeeded to it. Cal. Corp. Code § 1113(i). Under both California and Delaware law, [redacted] may be sued in its own name. Cal. Civ. Proc. Code § 369.5(a); Del. Code Ann. tit. 6, § 15-307(a)(2000). Similarly, both California and Delaware law authorize service upon a partnership such as [redacted]. See Cal. Civ. Proc. Code § 416.40(a) (authorizing partnership to be served through the person designated for service of process, or to a general partner or the general manager of the partnership); Del. Super. Ct. Civ. R. 4 (1999) (authorizing partnership to be served through an officer, a managing or general agent, or any other agent authorized by law to receive service).

(1) Based upon the foregoing, we recommend that you issue and serve the summons for information regarding the participation of [redacted] in the [redacted] transaction upon:

> [redacted], as successor to [redacted], by and through any individual or individuals designated by [redacted] who possess personal or institutional knowledge of the negotiation and execution of the transactions engaged in to implement the "[redacted] Partnership" structure that involved [redacted], [redacted], [redacted], [redacted], [redacted] (renamed [redacted]), [redacted], and [redacted].

We also recommend that you consider summonsing one or more of the individuals who were officers or employees of [redacted] who you have identified as having personal knowledge of [redacted]

's participation in the "
" structure. As no longer exists, we recommend that the summons be issued to the individuals in their own names rather than as officers of .

(2) We recommend that you reword the summons attachment as follows:

1. All documents and records in your possession and control relating to the implementation of the "
" structure that was the subject of 's. letter to Senior Vice President and that involved , , , , , (later renamed), , and including but not limited to:

   (a) Correspondence promoting and soliciting participation in the structure;

   (b) materials such as contracts, agreements, letters, prospectuses, offering materials, confidentiality agreement, opinions, reports, economic or tax analyses or projections, and accounting instructions;

   (c) documents relating to the planning and execution of the implementation of the structure;

   (d) records of communications with and among the parties involved in the structure, parties who were solicited for participation in the structure but who did not participate, and persons who provided legal, accounting, and tax advice; and

   (e) records of fees paid and received in connection with the structure such as fees paid by or to the participants.

2. The term "document" refers to any written, printed, typed, graphically, visually or aurally reproduced material of any kind, or other means of preserving thought or expression, and all tangible things from which

information can be processed or transcribed, including, but not limited to:

(a) Contracts, agreements, plans, term sheets, summaries, opinions, studies, reports, presentations, commentaries, communications, correspondence, memoranda, minutes, notes, comments, messages, telexes, telegrams, teletypes, cables, facsimiles, bulletins, announcements, press releases, brochures, notices of meetings, agendas, attendance lists, books, charts, graphs, surveys, manuals, and drafts, alterations or modifications of the foregoing;

(b) All electronic mail ("e-mail"), whether in an electronic or printed form including but not limited to all e-mail on the user's system, all user and/or administrator's back-up tapes and/or disks, and/or any other system or device which saves historical e-mails; and

(c) Video and/or audio tapes, cassettes, films, microfilm, computer files, computer discs, and any other information which is stored or processed by means of data processing equipment and which can be retrieved in printed or graphic form.

(c) Suggestions Relating to Requests to [redacted] Banks

(i) How to Pursue the Information

We reviewed the draft language prepared by Revenue Agent [redacted] of the [redacted] examination team. We understand that you will attempt to obtain the information relating to the banks' acquisition of interests in [redacted] from its TMP before seeking the information from the banks. We concur that it is a good idea to question the taxpayer (and other parties such as [redacted]) about the banks' involvement in [redacted]. We note, however, that some of the documents requested may be internal bank documents that are unlikely to be in the possession of other parties. As a result, we believe it will likely be necessary to contact the banks for the information.

Handbook 109.1 contains guidance on the service of summonses. Chapter 6 of Handbook 109.1 provides direction regarding serving summonses on third parties. Section 6.7.1 of Handbook 109.1 provides as follows:

> Special concerns exist with respect to a summons for information located in a country with which the United States has a treaty or tax information exchange agreement. In these cases, a treaty request through the Assistant Commissioner (International) must be made prior to service of a summons; and enforcement proceedings generally will not be made until the treaty or tax information exchange agreement partner has advised that it cannot obtain the information or further delay in enforcement of the summons will prejudice the IRS's case. These cases must be coordinated through the Assistant Commissioner (International) or the Associate Chief Counsel (International), Branch 1.[6]

Pursuant to the foregoing, we recommend that, if possible, you simultaneously attempt to use both the summons and treaty routes to obtain the information sought from the [redacted] banks.[7]

We understand that you have determined that [redacted] has a permanent establishment in the United States and can be served here. If that is the case, then we concur with the service of a summons on that bank through its U.S. office. We also recommend that you pursue the information sought from [redacted] through a treaty request.[8] As you have not identified a United States person or entity through which it would be possible to summons information from [redacted], we recommend that you pursue the information sought from that entity through a treaty request.

(ii) Summons/Treaty Request Language

The language we reviewed relates to a request to [redacted]. Our recommendations below relate to modifications of the language for use in a summons to that bank. Section 4.2.5 of Handbook 109.1 provides that a summons

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[6] Although section 6.7.1.3 deals with summonses for records of foreign branches of domestic banks, it also applies to summonses on domestic branches of foreign banks. See Section 6.7.2.3 of Handbook 109.1.

[7] We were advised to proceed in this manner by personnel of the Associate Chief Counsel (International) and Group 4, Tax Treaty Section, Large & Mid-Size Business Division.

[8] This is consistent with the advice we received from Group 4, Tax Treaty Section, Large & Mid-Size Business Division.

should not require the witness to do anything other than appear on a given date to give testimony and produce existing books, papers and records. It provides that a witness cannot be required to prepare or create documents. It would be inconsistent with that direction to ask for explanations and descriptions, but when you orally question them, you can ask for such.

Language similar to the language we recommend for a summons may also be used for treaty requests. In addition, depending on the terms of the U.S./[redacted] income tax treaty, it might also be possible to submit questions to the banks (as opposed to simply the requests for documents which are contained in the summons language). We recommend that you raise that issue during your coordination of the treaty requests. If you learn that the treaty provisions enable the Service to submit questions to the [redacted] banks, we can assist in drafting questions.

We recommend that you replace the definition of document contained in subsection (a) with the following:

> (a) The term "document" refers to any written, printed, typed, graphically, visually or aurally reproduced material of any kind, or other means of preserving thought or expression, and all tangible things from which information can be processed or transcribed, including, but not limited to:
>
> (1) Contracts, agreements, plans, term sheets, summaries, opinions, studies, reports, presentations, commentaries, communications, correspondence, memoranda, minutes, notes, comments, messages, telexes, telegrams, teletypes, cables, facsimiles, bulletins, announcements, press releases, brochures, notices of meetings, agendas, attendance lists, books, charts, graphs, surveys, manuals, and drafts, alterations or modifications of the foregoing;
>
> (2) All electronic mail ("e-mail"), whether in an electronic or printed form including but not limited to all e-mail on the user's system, all user and/or administrator's back-up tapes and/or disks, and/or any other system or device which saves historical e-mails; and
>
> (3) Video and/or audio tapes, cassettes, films, microfilm, computer files, computer discs, and any other information which is stored or processed by

means of data processing equipment and which can be retrieved in printed or graphic form.

We recommend that you replace references to [redacted] with [redacted].

We recommend that you add to definition (c) "and its affiliated entities."

We recommend that you add a definition (d) for [redacted] as follows: [redacted] includes [redacted] and all related entities including but not limited to [redacted] and [redacted].

We recommend that you omit the instruction "Where a document that has been requested cannot be provided because it's no longer in existence or is not in your custody or control, describe the document" from any summons. As noted above, section 4.2.5 of Handbook 109.1 provides that a summons should not require the witness to do anything other than appear on a given date to give testimony and to bring with him/her existing books, papers and records. It provides that a witness cannot be required to prepare or create documents. It would be inconsistent with that direction to ask for a description requested. This topic would be more appropriately asked during the questioning of a witness.

We recommend that you replace the description of the documents requested with the following:

1. All documents relating to or evidencing communications soliciting [redacted]'s investment in [redacted].

2. All documents obtained or used by [redacted] in connection with its evaluation of the opportunity to invest in [redacted] including but not limited to credit applications, projections of expected rates of return, economic analyses, promotional materials, legal opinions, and tax opinions.

3. All documents relating to or evidencing [redacted]'s evaluation of the opportunity to invest in [redacted].

4. All documents relating to or evidencing the internal approval process for [redacted]'s investment in [redacted].

5. All documents relating to or evidencing fees or other amounts received by [redacted] in connection with its investment in [redacted].

6. All documents relating to or evidencing amounts paid by [redacted] in connection with its investment in [redacted].

7. All documents reflecting [redacted]'s receipt of distributions from [redacted].

8. All documents relating to or evidencing methods by which [redacted] hedged or otherwise limited its risk with respect to its investment in [redacted].

This opinion is based on the facts set forth herein. It might change if the facts are determined to be incorrect or if additional facts are developed. If the facts are determined to be incorrect or if additional facts are developed, this opinion should not be relied upon. You should be aware that, under routine procedures which have been established for opinions of this type, we have referred this memorandum to the Office of Chief Counsel for review. That review might result in modifications to the conclusions herein. We will inform you of the result of the review as soon as we hear from that office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

If you have any questions about this advice, you should call Halvor Adams at (516) 688-1737.

ROLAND BARRAL
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By: _____
JODY TANCER
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Noted by:

_____
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